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In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. 518.

FRANK M. BRENNAN,
As Treasurer of Cuyahoga County, Ohio,
Petitioner,

vs.

THE UNITED STATES,
Respondent and Third-Party Plaintiff,

vs.

FLORENCE F. FERTIG; JULIA C. DeFRANCO (a.k.a. MRS. ANTHONY DeFRANCO, JULIA FERTIG DeFRANCO), ERMINO DeFRANCO, ANTHONY O. DeFRANCO (a.k.a. ANTONIO DeFRANCO), Individually and as Executor of the Will of MARY MARINO, Deceased, ELMORE C. EGGERT and FREDERICK C. HAHN, Individually and as Guardian of HARTILL HAHN,
Third-Party Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Claims.

JOHN T. CORRIGAN,
Prosecuting Attorney of Cuyahoga County, Ohio,

SAUL S. DANACEAU,
Assistant Prosecuting Attorney,

FREDERICK W. FREY,
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In the Supreme Court of the United States

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No. _____.

FRANK M. BRENNAN,
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Petitioner,

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THE UNITED STATES,

Respondent and Third-Party Plaintiff,

vs.

FLORENCE F. FERTIG, JULIA C. DeFRANCO (a.k.a. MRS. ANTHONY DeFRANCO, JULIA FERTIG DeFRANCO), ERMINO DeFRANCO, ANTHONY O. DeFRANCO (a.k.a. ANTONIO DeFRANCO), Individually and as Executor of the Will of MARY MARINO, Deceased, ELMORE C. EGGERT and FREDERICK C. HAHN, Individually and as Guardian of HARTILL HAHN,

Third-Party Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Claims.

I. THE JUDGMENT BELOW.

This was a three to two decision, as yet unreported. The judgment below, with dissenting opinion, is set forth in the appendix hereto, p. 17. No motion for a new trial or for a rehearing was filed in the Court of Claims.

II. GROUNDS FOR INVOKING CERTIORARI.

The case was decided by the Court of Claims on July 12, 1957, and the judgment entered on July 12, 1957.

No rehearing was had and no time for certiorari was extended.

The statutory provision believed to confer upon the Supreme Court of The United States jurisdiction to review by certiorari in this case is 28 U. S. C. A. 2101 Par. (c).

III. QUESTIONS PRESENTED.

The questions presented for review are as follows:

1. Where, in an appropriation of private property for public use instituted by the United States on April 22, 1942, to which proceeding neither the State of Ohio nor any of its concerned taxing subdivisions or any of their officers or agents were made parties, the United States Attorneys, on April 8, 1948, by their own admitted mistake paid out all of the compensation award money in the court registry to the owners of record of the property taken, leaving no funds for the payment of state and county taxes which were specific and perfected first priority liens on the property taken and superior to any claims of said property owners; and where, by arrangement pursuant to an established local practice said taxes were to be paid by the United States; and where after discovery of said mistake and refusal of the United States to pay said tax liens suit on said tax lien claims was instituted in the Court of Claims on April 13, 1953, within six years from the date of said mistake, is such suit barred by the Court of Claims jurisdictional statute of limitations?

The Court of Claims held that such suit is barred by the said statute of limitations.

The petitioner contends that such suit is not barred by the said statute of limitations.

2. Did the Court of Claims err in failing to give judgment in favor of the petitioner and in dismissing petitioner's petition? (Petitioner is suing

in his authorized representative capacity for said state and its concerned taxing subdivisions.)

Petitioner contends that the Court of Claims did so err.

IV. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The material part of the Fifth Amendment to the United States Constitution provides that—

> "No person shall * * * be deprived of * * * property without due process of law; nor shall private property be taken for public use without just compensation."

See also the Constitution of the State of Ohio, Art. I sec. 19.

The six year jurisdictional statute of limitations of the United States Court of Claims Act (R. S. sec. 1069; Mar. 3, 1911, C. 231, sec. 156, 36 Stat. 1139; 28 U. S. C. sec. 262) provides as follows, in material part:

> "Every claim against the United States cognizable by the Court of Claims shall be forever barred unless the petition setting forth a statement thereof is filed in the court * * * within six years after the claim first accrues."

The appropriation proceeding by which the United States took the concerned property was founded on the following statutes: Act of August 1, 1888, 25 Stat. 357 (U. S. C. Title 40, sec. 287); Act of Feb. 26, 1931; 46 Stat. 1421 (U. S. C. Title 40, sec. 258(a) and (e)); Act of Oct. 14, 1940 (Public No. 849, 76th Congress) as amended by Executive Order No. 9070, dated Feb. 24, 1942; Act of Mar. 1, 1941 (Public No. 9, 77th Congress) and Act of May 24, 1941 (Public No. 73, 77th Congress).

Suit was brought in the Court of Claims by the petitioner here under authority of the following statutes: Mar.

3, 1887, C. 359, sec. 1, 24 Stat. 505; Mar. 3, 1911, C. 231, sec. 145, 36 Stat. 1136; Judicial Code sec. 145(1); Title 28 U. S. C. sec. 1491; 28 U. S. C. sec. 250(1) (quoted verbatim, p. 13, *infra*) for the following jurisdictional reasons:

1. That this was a claim for just compensation under the Fifth Amendment to the United States Constitution arising from the taking of private property for public use in eminent domain proceedings.

2. That this suit is founded upon an implied contract with the United States.

The present petitioner's right to bring this suit in his representative capacity as treasurer of Cuyahoga County, Ohio, arises from the following sections of the Ohio Revised Code: 5719.05 and 323.24. All of the taxes herein concerned are delinquent taxes, drawing interest and penalties which were certified and published according to law under Ohio Revised Code, sec. 5721.03 (Ohio General Code sec. 5704) prior to commencement of the herein concerned appropriation proceeding, which certification and publication constitutes notice to all purchasers and takers, under Ohio Revised Code sec. 5721.11, of the state-county first priority tax liens fixed by Ohio Revised Code sec. 5719.01, and 5721.10. Section 5719.18 fixes the interest and penalty charges. There is no dispute in this case about the facts of the existence, certification and publication, amount, validity or statutory first priority (after court costs) of the said tax liens. For total amount due on said tax liens see plaintiff's exhibit 68 and add interest from date of taking at the federal rate of four percent which the state and county agreed to accept instead of the higher Ohio Statutory rate of interest otherwise applicable. Aside from the statute of limitations there is no dispute as to petitioner's right to sue in the Court of Claims.

V. STATEMENT OF THE CASE.

On April 22, 1942, the United States filed a petition in eminent domain in case No. 21234 in the United States District Court for the Northern District of Ohio, covering the taking of ten parcels of privately owned real estate for a federal housing project in Euclid, Ohio, a suburb of the City of Cleveland, in Cuyahoga County. On April 22, 1942 a Declaration of Taking was filed; and on April 23, 1942, a decree confirming the taking was entered, vesting fee simple title in the United States. At the time of the filing of the suit and the taking the State of Ohio and its taxing subdivision the County of Cuyahoga had valid, subsisting first priority tax liens against all ten of the parcels of real estate thus taken. To this appropriation proceeding the said state and county were never in any way made parties. When the attorneys for the state and county who handled such matters found out about the appropriation proceeding they went to the United States Attorneys handling that proceeding and an arrangement was made, pursuant to an established local practice in such cases, that when the United States was ready to pay these tax claims its attorneys would so advise the state-county attorneys who would then present tax bills and payment would be made by appropriate journal entries and final orders. This is evidenced by a long line of correspondence, conferences, and promises by the United States Attorneys to pay, all of which are in evidence. As to seven out of the ten parcels involved this arrangement worked perfectly, and on one other parcel (No. 5) originally involved in this suit, the United States collected from one of the third party defendants in this case during pendency of this action and turned all the money collected over to the plaintiff. So the taxes on eight of the ten

parcels have been paid in full pursuant to the said arrangement between the attorneys.

But in the case of parcels 2 and 3, which are the only parcels involved in this suit, the United States Attorney in charge of the appropriation proceeding failed to inform the state-county attorneys when the United States was ready to pay said compensation claims and in the cases of said parcels 2 and 3 the United States Attorneys settled with the record owners of the property by stipulation (See plaintiff's exhibits 69, 70, 71, 72 and 73) and, on April 8, 1948, paid out all the compensation money in the court registry to said property owners leaving nothing with which to pay the state-county tax lien claims on parcels 2 and 3. Strangely enough the written stipulations between the United States and the property owners (now third party respondents) provided in substance that the settlements were subject to taxes. The United States admits in its pleadings and in the record, that the payment of all the compensation money, applicable to parcels 2 and 3, to the property owners (third party respondents) was caused by a mistake on the part of the United States Attorneys. At the time this mistaken payment to the property owners was made the appropriation proceeding was still pending as to parcels 2 and 3 and the United States and the property owners had full knowledge of the tax liens of the State and County on those parcels; and as aforesaid the attorneys for the United States had repeatedly promised to pay said tax claims as soon as the United States was ready.

As to the payment of all the compensation money to the now third party respondents the state-county authorities and attorneys did not know of said payments until some time after they had been made, and were never

notified of the settlement conferences with the property owners. As soon as they found out about it they made demands on the United States Attorneys for payment, to no avail. Seeing this to be fruitless the state-county attorneys made written demand for payment on the Lands Division, Department of Justice of the United States. That demand (plaintiff's exhibit No. 37) was refused (plaintiff's exhibits 38, 39, 42 and 43). Suit was filed by plaintiff on Feb. 13th, 1953, in the United States of Claims. Basis for jurisdiction: Title 28 U. S. C. A. 250 and 1491. The tax claims concerned are based upon taxes levied for the operation and maintenance of the sovereign state government and its proper subdivisions.

After plaintiff's suit was filed in the Court of Claims the United States attorneys filed a motion in the condemnation proceeding to make the state-county authorities parties to the appropriation proceeding and to cite the former property owners who are now the third party defendants before the District Court to show cause why they should not be compelled to disgorge the money they received for parcels 2 and 3. To this, appearing only for the special purpose, the state-county authorities filed a motion to strike the United States motion from the files and to be permanently dismissed from said proceeding on the ground that nothing effective could any longer be done in the appropriation proceeding to rectify the mistake. The District Court (Judge Paul Jones) granted the motion to strike, denied the United States motion and dismissed the state-county authorities as parties to the appropriation proceeding. In so doing Judge Jones wrote a memorandum opinion and order which are attached as appendices to plaintiff's reply in the Court of Claims. See transcript.

VI. ARGUMENT

A. The Effect of What Happened in the Appropriation Proceeding.

The petitioner contends that up to the time when the United States, by its own admitted mistake, paid out all the compensation money in the Court registry to the property owners (third party respondents) the petitioner's state-county rights were fully alive in the appropriation proceeding. That is to say that as long as matters relating to parcels 2 and 3 were pending and undisposed of in the appropriation proceeding the rights of all parties having vested interests in said parcels were, perforce, fully alive and justiciable, so that at any time prior to the date of said mistake (April 8, 1948) any holder of any vested interest in said parcels had full right either to come into the cases as a formal party, or, as in petitioner's case, to rely upon the local practice and the arrangement between counsel made pursuant thereto. If this were not so then a mere lapse of six years' time could destroy vested rights and claims for compensation even though a claim had not yet been reached for adjudication and disposition in the appropriation proceeding. Surely no citation of authority is necessary to establish this basic and fundamental proposition. As long as the matters pertaining to parcels 2 and 3 had not been reached for adjudication and disposition in the appropriation proceeding no suit to dispose of them could have been brought by any owner of any interest in said parcels.

When the United States, by its mistake, paid out all the compensation money in the registry to the owners of record of the property that mistake destroyed the power of the District Court to give any effective relief on the Petitioner's tax lien claims as Judge Jones held. See opinion in appendix to Petitioner's Reply. There was no

more money in the registry and no suit could have been brought on Petitioner's claims in the District Court under the Tucker Act (Mar. 3, 1887; 24 Stat. 505; 44 Stat. 121; 28 U. S. C. A. sec. 41 (20)), even if the State or its political subdivisions had voluntarily become parties to the appropriation proceeding, because the Petitioner's claims as to each of parcels 2 and 3 exceeded the maximum jurisdictional limit ($10,000.00) for District Courts under the Tucker Act. There was, therefore, no other tribunal to which petitioner could go except the Court of Claims.

1. Now although under both Rule 71 A (a) (2) of the Federal Rules of Civil Procedure and under the law of Ohio, petitioner or his principals (the state and county) were strictly necessary parties to the appropriation proceeding they were never made parties to it. In 54 *American Jurisprudence*, at p. 971, it is stated that:

> "* * * federal courts are bound to follow decisions of state courts which have so clearly established a settled rule in the premises as to make it a part of the peculiarly local law of the state and constitute it a rule of property."

Accord: *U. S. vs. Dieckman* (C. C. A. Ind.), 101 Fed. (2) 421; *U. S, v. C. B. Q. R. Co.* (C. C. A. Wis.), 90 Fed. (2) 161, Cert. denied 302 U. S. 714.

Ohio Revised Code sec. 5721.11 (Ohio General Code sec. 5714) provides as follows:

> "The county auditor shall enter upon the county auditor's tax list and the county treasurer's duplicate, showing lands delinquent, the word 'delinquent' and such entry on said tax list and duplicate is notice to all purchasers or other persons acquiring any right, title or interest in or to the land pertinent to which such entry is made of the prior right and lien of the state under sections 5721.01 to 5721.28; inclusive of the Revised Code."

(The herein concerned taxes were so entered as "delinquent" at time of taking.)

In the case of *State ex rel. Crabbe, Atty. Genl. vs. The Municipal Savings and Loan Co., et al.*, 111 Ohio State 178 at p. 189, the Ohio Supreme Court held that:

> "Necessary parties are those without whom no decree at all can be effectively made determining the principal issues in the case."

Accord: *Donovan v. Campion*, 85 Fed. (C. C. A. 8) at p. 72.

In *Monroe v. Doe*, 7 Ohio 262 at p. 265, the Ohio Supreme Court held:

> "The state has a lien upon all land not exempt from taxation which is calculated to be perpetual and which cannot be affected by any sale or transfer. Neither will any length of possession affect this lien. It can be removed in no other way than by payment of all taxes, penalties and interest due on the land."

This is still the law of Ohio.

The case of *Allendorf vs. Campbell*, 65 Ohio App. 149, which is typical of all Ohio appropriation cases dealing with necessary parties in eminent domain proceedings, holds that all parties having any vested interest in the property taken are necessary parties to an appropriation proceeding in Ohio. See also *Meyers v. Heiwitt*, 16 Ohio 449; *Boyle v. Middleburgh Heights Realty Co.*, 75 Ohio App. 368; 24 *Ohio Jurisprudence*, p. 100.

Consequently if the question of necessary parties is controlling in this matter since the owners of these tax liens were necessary parties and were never made parties to the appropriation proceeding in any way and were never notified of the settlement with, and payment of all the compensation money to the property owners until some

time after that mistake was made, surely the rights of the owners of said tax claims are not destroyed or affected by the taking.

2. This brings us to the question of whether the arrangement between the federal and state-county attorneys relative to the manner of handling the presentation and payment of said tax claims was legal and binding upon the United States.

It is well settled that where there are liens on land taken or injured the court may allow the condemnor to pay the award into court for the benefit of the owner and the lienholders although the lienholders were not made parties to the condemnation proceedings. See *Cobo vs. U. S.* (C. C. A. Mich.), 94 Fed. (2) 351, for example. The award in such a case is a substitute for the land taken and the lienholder may have his lien satisfied out of the fund awarded and paid into court. This protection extends to judgment liens and tax liens. *Coggeshall v. U. S.* (C. C. A. S. C.) 95 Fed. (2). 986; *Lands in Hempsted, Nassau County, N. Y.* (D. C. N. Y.), 31 Fed. Supp. 513. For other cases on this proposition see 29 *Corpus Juris Secundum*, pp. 1108 to 1110, and annotation in 79 *Amer. Law Reports* 116. The procedure approved by these cases is identical with that agreed upon by the federal and state attorneys in the District Court appropriation proceeding herein concerned; and since the evidence is uncontradicted that the owners of the tax liens in this case never ceased to claim their due and continually kept up their inquiries and demands for payment (see over 70 exhibits and testimony of five witnesses in the record) it can hardly be said, as the Court of Claims held, that they slept on their rights by not voluntarily coming into the case as parties.

Where a tax lien existed against the property at the time it was taken and the lienholder was not made a party

to the condemnation proceedings and the holder of the fee obtained the entire award the lienholder does not lose his rights in the property. *Boyle v. Middleburgh Heights Realty Co.*, 75 Ohio App. 368. In this case what difference is there between not being made a party to the appropriation proceeding and being a victim of such a mistake which involved a breach by the United States of a perfectly proper agreement? In either event the owner of the lien is denied his constitutional rights, which simply cannot be thus destroyed. What assurance is there that this mistake would not have happened even if the state and county had been parties to the appropriation proceeding as the federal attorneys claim they were? And had that been the fact would the federal obligation to pay just compensation be satisfied if the same mistake were made and the United States refused to rectify it by payment? We think not. The right of eminent domain can only be exercised upon condition that just compensation be paid to all who have any vested interest in the property taken, including political subdivisions.

U. S. vs. Lynah, 188 U. S. 445;
Searl vs. School Dist. No. 2, 133 U. S. 553;
Sweet vs. Rechel, 159 U. S. 380;
U. S. v. Rogers, 255 U. S. 163.

Petitioner's liens here are "specific and perfected liens" of a sovereign state such as those contemplated in *U. S. v. Knott*, 298 U. S. 544 at p. 551.

B. Plaintiff's Right to Sue in the Court of Claims.

As already explained when the federal mistake was made on April 8, 1948, it destroyed the power of the District Court to give plaintiff any effective relief. There was no place for petitioner to go but to the Court of Claims.

1. The jurisdiction of the Court of Claims is set forth in the Judicial Code, sec. 145; 28 U. S. C. A. sec. 250, and is as follows in material part.

"(1) *Claims against United States.*

First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty if the United States were suable * * *."

As stated in petitioner's petition in the Court of Claims the grounds claimed by petitioner as constituting his right to sue in the Court of Claims are:

(a) That this suit is a claim for just compensation under the Fifth Amendment to the United States Constitution arising from a taking of private property in eminent domain proceedings by the United States.

(b) That this suit is also founded on an implied contract with the United States.

In a case of taking property for public use, the law implies a promise to pay for the property taken according to law, which, if the taking was by the general government, will uphold an action in the Court of Claims under the Tucker Act.

U. S. vs. Lynah, 188 U. S. 445;
Hurley vs. Kincaid, 285 U. S. 95;
U. S. vs. Causby, 328 U. S. 256;
U. S. vs. Dickinson, 331 U. S. 745;
U. S. vs. Louisiana, 123 U. S. 32.

A contract may be implied where officials of the government acting under authority of Congress take private property for public use.

U. S. vs. Great Falls Mfg. Co., 112 U. S. 645.
Great Falls Mfg. Co. vs. Garland, 124 U. S. 511 (or 582).

It would appear that under the statute and cases just cited there is no doubt about the fact that the Court of Claims has jurisdiction to hear cases of this sort if filed in time.

With respect to the six year jurisdictional statute of limitations already cited and quoted, *supra*, the important language to consider, we submit, is, that before that statute can start to run one must have a case "cognizable by the Court of Claims." In this case there was no case cognizable by the Court of Claims until the date of the payment of all the award money to the owners of the property which occurred on April 8, 1948. Therefore the Court of Claims jurisdictional statute started to run on that date. Petitioner's suit was filed on April 13, 1953, well within the six year period. Moreover the date of the federal mistake was less than six years from the filing and confirmation of the declaration of taking in the appropriation proceeding and up to the time of the mistake there had been no adjudication of any rights as to parcels 2 and 3 and no notice of any kind was given to the state or county of the final disposition as to parcels 2 and 3 at the time the mistake was made. We have already shown that our tax lien rights were fully alive when the mistake was made, and why.

The Statute of Limitations will not be allowed to run against a right until that right has accrued in a shape to be effectively enforced.

Borer v. Chapman, 119 U. S. 587 at p. 602.

The Statute of Limitations does not begin to run against a party until there is a denial of his rights.

U. S. vs. Smith, 105 U. S. 620 at p. 621.

A claim will not become stale, nor will the statute of limitations run on it, until the owner of the claim is able to have the claim ascertained in proper proceedings to enforce it. A claim cannot be ascertained until it can be presented.

Buchanan vs. Upshaw, 1 Howard 56;
Dickson vs. Patterson, 160 U. S. 584;
U. S. vs. Louisiana, 123 U. S. 32;
U. S. vs. Dickinson, 331 U. S. 745;
U. S. vs. Smith, 105 U. S. 620 at p. 621.

It is, therefore, submitted that the Court of Claims jurisdictional statute could not have run against petitioner as held by the Court of Claims and that the concerned state and county are fully entitled to their rights under the Fifth Amendment.

C. Concerning the Sovereign Rights of the State and County.

Since the taxes herein concerned were assessed and levied for the operation and maintenance of the state government and its county subdivisions and since nothing connected with said taxes interfered with or touched any federal power, duty, function, or field of operations the fact is that as to said taxes and liens the sovereignty of the State of Ohio is co-equal to that of the United States and cannot be destroyed, even as to its incidents, by any such federal mistake as here involved nor by any refusal of the United States to pay just compensation. State laws prescribing the mode and subjects of taxation for the support of the state government, which do not intrench upon the

legitimate authority of the Union or violate any rights recognized or secured by the Federal Constitution are not subject to supervision or control by any department of the Federal Government.

Kirtland vs. Hotchkiss, 100 U. S. 491;
McCullough vs. Maryland, 4 Wheaton 316;
Low v. Austin, 13 Wallace 29 at p. 35;
Mich. Cent. R. Co. v. Powers, 201 U. S. 245;
Brush v. Com'r. of Int. Rev., 300 U. S. 352.

By its ruling the Court of Claims has, in effect, held that by virtue of the Federal Government's sole mistake and its refusal to pay the just compensation guaranteed by the Fifth Amendment the United States may hold for naught and disregard the independent sovereignty of a state and its proper incidents and rights. This, the petitioner contends, is error which should not be allowed to go uncorrected.

VII. CONCLUSION.

For the reasons advanced above the petitioner respectfully requests the Court to allow a writ of certiorari in this case.

Respectfully submitted,

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APPENDIX.

Opinion, Findings of Fact and Judgment of the Court of Claims.

IN THE UNITED STATES COURT OF CLAIMS

No. 142-53.

(Decided July 12, 1957.)

FRANK M. BRENNAN, as Treasurer of Cuyahoga County, Ohio, v. THE UNITED STATES, *et al.*

Mr. Frederick W. Frey for plaintiff. *Mr. John T. Corrigan* was on the briefs.

Mr. Walter H. Williams, with whom was *Mr. Assistant Attorney General Perry W. Morton* for defendant. *Mr. Lawrence W. Sperling* was on the brief.

Mr. J. Harold Traverse, for third-party defendants.

OPINION.

WHITAKER, *Judge,* delivered the opinion of the court:

Plaintiff sues to recover taxes assessed by Cuyahoga County, Ohio, against two parcels of land in said county, which parcels, together with eight others, were condemned by the United States on April 22, 1942, for a housing project known as Lake Shore Village. Defendant pleads the statute of limitations.

The petition for condemnation was filed April 22, 1942. It sought to condemn "the fee simple absolute discharged of all liens, encumbrances, charges, claims, restrictions, and covenants whatsoever." At the same time, defendant filed a declaration of taking of "the full fee simple title." Coincident with the filing of the declaration of taking, defendant paid into the registry of the court its estimate of just compensation.

On the following day the court entered a decree vesting the fee simple title in the United States. The decree was recorded in the land records of Cuyahoga County on May 4, 1942.

Defendant went into possession shortly after the filing of the declaration of taking. The project was completed in June 1944.

Plaintiff's petition was filed April 13, 1953, nearly eleven years after the taking. It is barred by the statute of limitations.

Upon the entry of the decree of the District Court on April 23, 1942, fee simple title to the land was vested in the United States. Thereupon, all, who prior thereto had any sort of title to the land or lien upon it, were divested of their title or lien, and there was substituted therefor an obligation on the United States to pay them just compensation for their interests.

Irrespective of the proper forum in which to assert such a claim, it is obvious that it must be asserted within six years from the date of the entry of the decree vesting title in the United States. It was then that plaintiff's claim accrued. The United States has consented to suit against it only on condition that it be brought within six years from the time the action accrues. This suit, having been brought more than six years after plaintiff's action accrued, is barred, and we have no jurisdiction to consider it.

Plaintiff says the County was not made a party to the condemnation proceedings in the District Court and, therefore, that it is not bound by them. Even if we concede this—which we do not—still, plaintiff had to assert its claim in some forum within six years from the time its interest in the property was taken. This it did not do.

What happened in the condemnation proceedings is beside the point. The point is, does this Court have jurisdiction? We do not have, because plaintiff's claim was not filed here within six years from the time it arose.

As a matter of fact, plaintiff's remedy was in the District Court. Upon the vesting of title in the United States by decree of the District Court, that court had jurisdiction to determine just compensation, and jurisdiction to determine to whom it should be distributed. Every one claiming any interest in the property and who had notice of the proceedings were required to appear and assert their claims. It is admitted that the County had actual knowledge of the proceedings. It was obliged to have had. It was in that forum that it should have asserted its claim. Had it done so, that court undoubtedly would have protected its rights.

Instead, it relied upon some sort of alleged informal understanding it had with the Special Assistant United States Attorney, which, it says, was overlooked when disbursement of the funds were made. However that may be, that court entered a decree determining just compensation for the property, and the United States has paid into court the amount determined. That payment fully discharged the United States of its obligation, at least as to all claims not asserted within six years of the taking.

Plaintiff's petition will be dismissed.

It is so ordered.

LARAMORE, *Judge*, and MADDEN, *Judge*, concur.

JONES, *Chief Judge*, dissenting:

To deny recovery in this case is unthinkable. Such action would directly violate the Fifth Amendment in two respects. It would deprive plaintiff of property without

due process of law, and it would involve the taking of private property without just compensation.

That can't be done against an individual, much less against a State.

The defendant admits that neither the State, county, nor any of their officers or agents were made parties to the proceeding. How can they be bound?

The defendant says that some of the State or county officers knew about the proceeding. Are we to have citation by rumor or by the uncertain word of the village gossip? There are some of the forms of procedure that are vital and cannot be supplied by the conflicts and uncertainties of oral testimony.

These taxes were a first lien on the land. As was stated in *Monroe v. Doe*, 7 Ohio 262, 265:

> * * * The state has a lien upon all land not exempt from taxation, which is calculated to be perpetual and which cannot be affected by any sale or transfer * * *. It can be removed in no other way than by payment of all taxes, penalties and interest due on the land.

In volume 24 of the original edition of *Ohio Jurisprudence*, at p. 100, is found the following language:

> It is a fundamental proposition that persons having rights in land cannot be affected by a judgment or decree taking such land unless they are parties to the proceedings. [Citing *Meyers, Fall & Collins, et al. v. Hewitt*, 16 Ohio 449.]

As in practically all States, a tax lien is a first lien and is superior to all other liens.

We quote from 2 *Lewis Eminent Domain* § 524 (3d Ed., 1909):

> In Nebraska it has been held that a tax lien in favor of the State was not divested by a condemnation

> for railroad purposes * * * lien holders are *owners* within the statute and * * * must be made parties and * * * to divest their interest. [Citing *State v. Mo Pac. Ry. Co.*, 75 Neb. 4, 105 N. W. 983.] * * * In any case the lien would undoubtedly follow the fund and could be enforced against the fund * * *. [Citing *In re Sleeper*, 62 N. J. Eq. 67, 49 Atl. 549.]

We quote from section 538 of the same authority:

> If a necessary party is omitted, the proceedings will be nugatory as to such party. But as a general rule such an omission does not vitiate the proceedings as to those who are parties, nor can the latter complain of such omission. [Citing cases.]

The author then states the general principles gleaned from a review of a great many eminent domain cases. These include, *inter alia*, that the Fifth Amendment should be liberally construed for the protection of private rights; that the word property includes every valuable interest which a person can have in or appurtenant to land; and that due process of law requires that the owner of any such right or interest should have a reasonable opportunity to be heard on the question of compensation before he can be deprived thereof for public use.

It has been held that payment to one other than the person entitled thereto is not a defense. *Palo v. Rogers*, 116 Conn. 601, 165 Atl. 803 (1933).

The courts have uniformly held that where property is subject to a tax lien, the payment of compensation money into the registry of the court does not extinguish the tax lien, but the lien is merely transferred from the land to the fund. *Board of Capitol Managers v. Brasie*, 72 Colo. 153, 210 Pac. 63 (1922); *Ross v. Kendall*, 183 Mo. 338, 81 S. W. 1107 (1904); *Carpenter v. City of New York*, 44 App. Div. 230, 60 N. Y. Supp. 633 (1899).

We quote from the *Brasie* case, *supra*, the following:

> The money in the registry of the court stood in the place of the land, and the court below fell into error in not so holding. So much of the funds in the hands of the clerk as may be necessary should be applied to the payment of the special improvement tax, with accrued interest thereon, and the remainder, if any, should be paid to the respondent.

To hold that the statute of limitations should deprive a sovereign State of a just claim, in the circumstances of this case, would be little less than tragic. A. F. O'Neil, Special Assistant United States Attorney, testified that he had paid millions of dollars to the county authorities, on other parcels of land and in other cases, and in no case was the county made a formal defendant. This procedure, therefore, was the customary and established way of handling such matters between county and Federal authorities. The tax lien, being a first lien, always followed the proceeds and became a lien on any fund that might be paid into court by way of compensation.

Witnesses on both sides in this case testified that in this particular county it often happens in Federal and State condemnation cases that the county is not made a party defendant, but is paid off by orders of distribution after notification that the time is ripe for presentation of tax bills. In Corpus Juris Secundum the following language appears:

> It is well settled, however, that where there are liens on the land taken or injured, the court may allow the condemnor to pay the award into court for the benefit of the owner and the lienholders, *although the lienholders were not made parties to the condemnation proceedings*. 29 C. J. S., *Eminent Domain* § 200. [Emphasis supplied.]

The first overt act by the Government which gave any indication that the Federal Government intended to refuse to recognize the validity of the tax liens was when the orders of distribution were entered on April 8, 1948. Prior to that date the county had been repeatedly assured by letter of the Special Assistant United States Attorney in charge of the condemnation proceedings, Mr. O'Neil, that the taxes would be paid out of any funds arising out of a jury or court verdict entered on final trial and disposition of the case. The funds were distributed without regard to the valid existing tax liens, and without provision for their payment. Again the county officials were not notified and the rights of the plaintiff were completely ignored. "Upon what meat doth this our Caesar feed, that he is grown so great" as to be able to ignore the established rights of a subdivision of a sovereign State? One is reminded of the story of the cannibal who is said to have claimed title to a piece of land on the ground that he ate the owner.

Up to that good hour there was no occasion for suit to be filed. The State and county could not file foreclosure proceedings. It had apparently been the usual custom to pay the taxes as a recognized first lien out of the proceeds of compensation.

The suit was filed in this Court April 13, 1953, well within the six-year statutory period.

In spite of the declaration of taking and physical possession, the process of taking was not complete until April 8, 1948, when the funds were actually diverted from their proper channels and the repudiation of the obligation was finally declared. In any event, limitation could not possibly begin to run before February 16, 1948, when final judgment was entered. Until that time condemnation

proceedings were still pending and the act of legal taking had not been completed.

The declaration of intention to take the fee simple title to property, plus the actual taking of physical possession, are not sufficient to transfer title. The Constitution says "nor shall private property be taken for public use, without just compensation." Certainly final action by the court in the condemnation proceeding which had been filed was necessary before legal title passed.

The money was paid out to the former owners under an ambiguous agreement that apparently led such owners to believe that they were being paid these amounts for their equity. At the time these ambiguous agreements were made the Federal officials were fully aware of the fact that the sums that they were agreeing upon and paying were insufficient to cover the tax liens. In spite of all this, the money was paid out without a word being said to the plaintiff, who held a first lien on the fund. Whatever else may be justified, the defendant would be liable for such of the valid unpaid taxes that were in effect at the time the declaration of taking of the land was first made, to the extent at least that the funds unjustly distributed would have been sufficient to absorb such taxes.

The facts shine through this whole record that the Federal officials apparently feared to let the rate of compensation as to this suburban property be fixed at a regular trial and deliberately settled with the equity owners for the purpose of leaving the plaintiff without any enforceable rights.

I would hold that plaintiff's cause of action first accrued on April 8, 1948, when plaintiff's first lien claim was first repudiated.

And in the alternative, I would certainly hold that the act of paying out the settlement funds, on which plaintiff

held a first lien, created a new cause of action to the extent that such settlement funds were sufficient to pay such taxes.

Whatever may be claimed as to any action or lack of action on the part of plaintiff, there was a cause of action that accrued when, with full knowledge of plaintiff's rights in and lien on the compensation fund, the Federal officials paid out such funds without any notice to plaintiff. This, to the extent of such funds, certainly was a taking of plaintiff's rights in the property. Up to the time of the distribution of the award moneys to the former owners the county's rights were fully alive and unimpaired in the condemnation case.

I would allow plaintiff to recover the amount of taxes with interest from April 8, 1948.

LITTLETON, *Judge*, joins in the foregoing dissenting opinion.

FINDINGS OF FACT.

The court having considered the evidence, the report of Commissioner Paul H. McMurray, and the briefs and argument of counsel, makes the following findings of fact:

1. On April 22, 1942, the defendant filed a petition in condemnation and a declaration of taking in the action entitled *United States of America v. Certain Parcels of Land in the County of Cuyahoga, State of Ohio, and Peter Frank, et al.*, Civil No. 21234, in the United States District Court for the Northern District of Ohio. The action was filed to acquire the land in the City of Euclid, County of Cuyahoga, described in the petition and declaration of taking for the purpose of providing housing in connection with national defense activities. The petition stated that the estate or interest which defendant sought to acquire in the land was "the fee simple absolute discharged of all liens, encum-

brances, charges, claims, restrictions, and covenants whatsoever; * * *." The declaration of taking stated that "The estate taken for said public use is the full fee simple title in and to said lands." When the declaration of taking was filed, the defendant deposited in the registry of the court the amount estimated to be just compensation for all interests in the land. The declaration of taking described 13 parcels of land, and the total amount deposited in the registry of the court, as just compensation for all of the parcels was $73,516.00. The amount deposited as just compensation for parcel 2 was $21,450.00, and the amount deposited for parcel 3 was $13,450.00. On April 23, 1942, the court entered a decree on the declaration of taking determining that the title to the land in fee simple absolute was vested in the United States. The decree was recorded in the land records of Cuyahoga County on May 4, 1942, in Vol. 5439, p. 243.

2. Neither the State of Ohio, County of Cuyahoga, nor any official of the state or county was formally named as a party in Civil Case 21234, although they had full knowledge of the condemnation proceedings.

The officials of Cuyahoga County, Ohio, had actual knowledge of the pendency of the condemnation suit involved in this action. In 1942 the County Treasurer's office furnished the attorneys, representing The United States, tax bills for the land involved in this litigation. The United States disputed the amount the County was claiming. As a result of this controversy over the validity and the correct amount due, a Mr. A. F. O'Neil, who was handling the matter for the defendant, urged the Auditor, the County Prosecutor, the Board of County Commissioners, the Treasurer and a representative of the State Tax Commission to come into the condemnation proceedings and to set up their interest in the property, but to no avail. An action

to recover the taxes was first asserted by the County of Cuyahoga in its petition filed in this Court on April 13, 1953. This was more than ten (10) years after the County had actual knowledge of the pendency of the condemnation proceedings.

3. The persons named in the declaration of taking as the owners of parcel 2 were Ermino and Antonio DeFranco and Matilda Marino; the persons named as the owners of parcel 3 were Frank M. Fertig and Freda Fertig. Answers were filed in this case claiming that the values of parcels 2 and 3 were greater than the Government's estimated values, the amounts which had been deposited in the registry of the court for parcels 2 and 3.

4. On April 22, 1942, there were delinquent taxes, special assessments and penalties on parcels 2 and 3 which were liens on the land as follows:

Tax Year	Parcel 2	Parcel 3
1930	$536.32	----------
1931	1,332.55	$798.32
1932	1,057.90	798.00
1933	931.27	712.46
1934	2,623.06	1,706.17
1935	2,989.33	1,794.36
1936	3,007.71	1,809.87
1937	2,817.58	1,712.46
1938	2,502.52	1,537.24
1939	2,221.27	1,255.83
1940	2,177.03	1,229.03
1941	1,908.67	1,075.13
Total	$24,105.21	$14,428.87

Taxes and special assessments for the tax year 1942 were a lien on April 22, 1942, but the amounts were unknown at that time. The amounts were subsequently ascertained to be $1,840.00 as to parcel 2 and $1,015.39 as to parcel 3. In addition, there were special assessments which were a lien on the land for the full amount of the assessments when levied, but payable in annual installments after 1942. These were as follows:

Installments	Parcel 2	Parcel 3
1943	$1,307.13	$679.40
1944	1,274.92	662.10
1945 and subsequent years	3,480.96	1,811.30

5. The amounts due for special assessments on parcels 2 and 3 for 1945 and subsequent years were paid directly to the City of Euclid by the clerk of the district court from the amounts deposited as estimated just compensation for those tracts pursuant to an order for distribution filed November 29, 1945. The other taxes, penalties and special assessments were not paid from the amounts deposited in the registry of the court or otherwise.

6. All taxes, penalties and special assessments which were a lien on the land on April 22, 1942, were paid to the County of Cuyahoga or the City of Euclid as to all parcels included in civil case No. 21234, except as to parcels 2, 3 and 5. Partial payment of the amounts which were liens on parcels 2, 3 and 5 were paid by the clerk of the court to the County or to the City of Euclid from the funds on deposit in the registry of the court. The following payments were made from the funds on deposit in the registry:

(1) Under a final judgment and order of distribution filed November 20, 1942, the County Treasurer was paid $3.37 for taxes on parcel 10.

(2) Under a final judgment and order of distribution filed November 30, 1942, the County Treasurer was paid $3,907.60 for taxes on parcel 5.

(3) Under an order for distribution filed February 10, 1944, the County Treasurer was paid $231.27 and the City of Euclid was paid $483.73 for special assessments on parcel 5. Subsequently, the County and the City returned

the checks for these amounts for the reason that they did not represent full payment and the County and City would not accept partial payment. The checks were re-deposited in the registry of the court.

(4) Under an order for distribution filed February 10, 1944, the County Treasurer was paid $14.74 for taxes on parcel 9.

(5) Under an order for distribution filed July 31, 1945, the County Treasurer was paid the following for taxes:

Parcel 1	$7,160.31
Parcel 4	1,532.87
Parcel 6	4,376.78
Parcel 8	8,864.26
Parcel 10	3.94
Total	$21,938.16

(6) Under an order for distribution filed July 26, 1946, the County Treasurer was paid $5,582.31 for taxes on parcels 7, 7A, 7B and 7C.

(7) Under an order for distribution filed August 12, 1946, the County Treasurer was paid $36.71 for taxes on parcels 7, 7A, 7B and 7C.

(8) Under an order for distribution filed November 29, 1945, the City of Euclid was paid the following for special assessments:

Parcel 2	$3,480.96
Parcel 3	1,811.30
Parcel 4	209.95
Parcel 5	431.91
Parcel 6	145.91
Parcel 7	266.56
Parcel 8	507.74
	$6,854.33

7. Although a special assessment was a lien for the full amount of the assessment when made, it was payable in annual installments over a period of years. The County officials could charge on the tax duplicates and collect only the annual installments as they became due. Under Ohio law, however, the political subdivision, here the City of Euclid, could accept payments of annual installments not yet due. The political subdivision notified the county auditor of such payments and the future installments were then canceled.[1] Payments to the City of Euclid in Civil Case No. 21234 were accepted by the City of Euclid and the County under this procedure. Installments for the tax years 1945 and thereafter on Parcels 2, 3, 5 and others were paid directly to the City of Euclid and, therefore, canceled on the Auditor's Assessment records and never charged to the tax duplicate. The County makes no claim for the installments payable in 1945 and subsequent years on parcels 2 and 3, because those installments were paid to the City of Euclid.

8. On June 1, 1939, the County Auditor issued a delinquent land tax certificate covering the DeFranco property, which later became parcel 2 in Civil Case No. 21234. On September 22, 1939, the County Prosecutor filed an action in the Court of Common Pleas of Cuyahoga County

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[1] Page's Ohio General Code, section 5677: "The taxing authority of any political subdivision which has levied or shall hereafter levy any special assessment or reassessment payable in installments over a period of more than one year, may * * * accept payment in cash of all of the installments of such assessments or reassessment charged against any lot or parcel of land and not due * * *."

Section 5677-1: "If such installments have been certified to the county auditor for collection, the fiscal officer of the subdivision shall, upon the payment of such installments, certify the fact of such payment to said county auditor, who shall thereupon cancel such installments upon his records."

on behalf of the County Treasurer to foreclose on the DeFranco property for non-payment of delinquent taxes. A journal entry of foreclosure was filed on October 13, 1941. No further action has been taken in that case and it is still pending in the Court of Common Pleas.

9. In June 1942, shortly after the filing of the petition and the declaration of taking in Civil Case No. 21234, Mr. Frank M. Brennan, Chief Deputy County Treasurer of Cuyahoga County, now the Treasurer and the plaintiff in this action, was aware of the legal description of the entire area acquired by the Government, and the parcels included in the case. He also knew the individuals who owned each parcel of land and the amount of taxes due on each parcel. In 1942, Mr. Brennan knew that the County had not been joined as a party in Civil Case No. 21234 and he notified Mr. Ralph W. Edwards, Chief Assistant Prosecuting Attorney, for the purpose of asserting the County's claim. The first statement of the county's complete claim was in a letter dated July 1, 1952, from Assistant Prosecuting Attorney Smolka to Special Assistant United States Attorney O'Neil. Mr. Brennan expected that taxes would be paid to the county out of the funds on deposit in the registry of the court, but he did not check the court records to determine whether the funds on deposit were sufficient to pay the amounts claimed by the county.

10. Mr. Ralph W. Edwards was the Chief Assistant Prosecuting Attorney of Cuyahoga County from 1942 until about 1950 in charge of the Civil Division of the County Prosecutor's office. He was responsible for representing the county in condemnation actions. In 1942, Mr. Edwards knew that the county had claims for taxes on the parcels included in Civil Case No. 21234 and that the county had not been joined as a party. On June 14, 1945, an order was

entered in Civil Case No. 21234 with respect to eight parcels of land, including parcels 2 and 3, which provided:

> THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that said land, * * * are exempt from all taxes, assessment, penalties or process levied after the year 1942 and for as long as title to said land shall be retained by the United States of America and the use of said land shall serve a public benefit, and that any and all taxes, assessments and penalties levied by the taxing authorities of Cuyahoga County, Ohio, after the year 1942 are null and void and held for nought and the taxing authorities of Cuyahoga County, Ohio, are forever barred from collecting same.
>
> (s) R. N. WILKIN,
> *United States District Judge.*
>
> Approved:
> (s) A. F. O'Neil,
> *Special Assistant U. S. Attorney.*
> (s) Frank T. Cullitan,
> *Prosecuting Attorney by R. W. Edwards, Attorney.*

R. W. Edwards whose signature appears on the order is the same person as Ralph W. Edwards.

11. Mr. Julius J. Badzik is an Assistant Prosecuting Attorney of Cuyahoga County. From May 1943 until 1946 he was assigned the responsibility of collecting the delinquent taxes on the Fertig property, which is parcel 3 in Civil Case No. 21234. The collection of those taxes had been pending in the County Prosecutor's office since 1939 or earlier, but no action was ever filed to foreclose on the property. Mr. Badzik's efforts to effect collection consisted of several telephone conversations with an attorney for the former owners in 1944 and 1945, a telephone conversa-

tion with one of the former owners in 1944 and several letters written to Mr. O'Neil in 1946. In May 1945, he was informed that the case would be tried. By letter dated February 18, 1946, Mr. O'Neil told Mr. Badzik that the case was on the March trial list and went on to say, "The amount which is on deposit in court now is not enough to pay all the delinquent taxes and it may be that the jury verdict will be in an amount which will completely cover all taxes." Mr. Badzik never examined the court records in Civil Case No. 21234 to ascertain what amount had been deposited as estimated just compensation. After he knew from the letter of February 18, 1946, from O'Neil, that the amount on deposit was insufficient to pay the county's claim, he took no action to assert the claim in Civil Case No. 21234. In his subsequent letters in 1946, he merely inquired as to whether the case had been tried and about the amount which had been awarded. The last report he received from Mr. O'Neil, on November 13, 1946, was: "As soon as the issues have been resolved you will be advised of the outcome." Thereafter, the collection of delinquent taxes on parcel 3 was transferred from Mr. Badzik to Mr. John F. Smolka.

12. Mr. John F. Smolka is an Assistant Prosecuting Attorney of Cuyahoga County. Beginning in May 1943, he was assigned the responsibility of collecting the delinquent taxes on the DeFranco property, which is parcel 2 in Civil Case No. 21234. Between 1944 and 1948, Mr. Smolka had conversations with and wrote letters to Mr. O'Neil concerning taxes. Soon after the collection of taxes on parcel 2 was assigned to Mr. Smolka, he was informed of the pendency of Civil Case No. 21234. He knew that in a condemnation action, the United States pays only the market value of the land, even though there are liens on the land

which exceed that value. Although Mr. Smolka never examined the court records in Civil Case No. 21234, he knew on November 3, 1945, that the United States had deposited $21,450 as estimated just compensation for parcel 2. At that time, his own records showed that the property had been foreclosed in 1941 for nonpayment of taxes in the sum of $28,446.52. On November 28, 1945, he was advised specifically by Mr. O'Neil that the amount on deposit was insufficient to pay the County's claim on parcel 2 and on other parcels, and Mr. Smolka called this to the attention of Mr. Ralph W. Edwards, Chief Assistant Prosecuting Attorney. On February 18, 1946, Mr. O'Neil told Mr. Smolka that the case was on the March trial list and stated further that "The amount which is on deposit in court now is not enough to pay all the delinquent taxes and it may be that the jury verdict will be in an amount which will completely cover all taxes." Mr. Smolka took no action to assert the County's claim in Civil Case No. 21234 at that time or thereafter.

13. By stipulation dated December 6, 1947, the United States and the former owners of parcel 2 stipulated "that the sum of Thirty Thousand dollars and no cents ($30,000.00), inclusive of interest, shall be in full satisfaction of and just compensation for the taking by the United States of America" of parcel 2. The stipulation also provided:

> It is further stipulated and agreed by and between the parties hereto that the sum of Thirty thousand dollars and no cents ($30,000.00), shall be subject to all liens, encumbrances and charges of whatsoever nature existing at the time of the taking of the said land and that any and all awards of just compensation ascertained and awarded in this proceeding and established by judgment herein to any and all

parties now or subsequently named as defendants herein, shall be payable and deductible from the said sum, * * *

By stipulations dated December 19, 1947, and January 17, 1948, the United States and the former owners of parcel 3 stipulated "that the sum of Twenty Thousand dollars and no cents ($20,000.00), inclusive of interest, shall be in full satisfaction of and just compensation for the taking by the United States of America" of parcel 3. These stipulations contained the same paragraph as the one quoted immediately above, except that the amount stated was $20,000.

On February 16, 1948, pursuant to the stipulations, final judgments were entered in Civil Case No. 21234 determining that just compensation for parcel 2 was $30,000 and just compensation for parcel 3 was $20,000. On April 8, 1948, on application of the United States, orders for distribution were entered under which the former owners of parcel 2 were paid $26,519.04 ($30,000, less $3,480.96 previously paid to the City of Euclid) and the former owners of parcel 3 were paid $18,188.70 ($20,000, less $1,811.30 previously paid to the City of Euclid).

14. After the payments from the funds on deposit in the registry of the court made under the orders for distribution of April 8, 1948, all funds in the registry available for payments in connection with parcels 2 and 3 were exhausted.

15. Within a month after April 8, 1948, the Chief Deputy County Treasurer knew of the payments made under the orders for distribution and he informed the Chief Assistant Prosecuting Attorney, Ralph W. Edwards.

16. There is no evidence that any county official ever made any demand upon the former owners of parcels 2, 3

and 5 for payment from the amounts they received and there is no evidence that any county official ever made any effort to ascertain whether a demand would result in payment to the county.

When the present action was filed, it included a claim by the county for unpaid taxes on parcel 5. The United States Attorney made a written demand upon the former owners of parcel 5 that they pay to the County Treasurer the amount of the general taxes and special assessments due at the time the declaration of taking was filed. This demand resulted in payment to the County Treasurer of $413.19, the amount claimed to be due.

17. The plaintiff, Treasurer of Cuyahoga County, Ohio, has agreed that the values of parcels 2 and 3 are the amounts stated in the stipulations between the United States and the former owners.

18. It is not established that Mr. O'Neil had authority by virtue of his office or was otherwise authorized to make any commitment to, or enter into any arrangement with, any county official binding the United States with respect to payment of taxes to the county. The contemporary documentary evidence does not show that Mr. O'Neil made any commitment to, or entered into any arrangement with, any county official with respect to payment of delinquent taxes.

19. A housing project, known as Lake Shore Village, was constructed by the United States on the land acquired in Civil Case No. 21234. It included 800 units, the first of which was completed in August 1943 and all were completed by the end of June 1944.

20. On November 13 and 14, 1947, Mr. William O. Chatterton, an attorney from the Department of Justice in Washington, and Mr. Victor M. Todia, an attorney rep-

resenting the former owners of parcels 1, 2, 3 and 4 in Civil Case No. 21234, negotiated for a settlement of the amount to be paid by the United States as just compensation for the four parcels. Mr. Chatterton informed Mr. Todia that he would recommend a settlement in the amount of $65,000, inclusive of interest, for the taking of the fee simple title to the four parcels. On November 14, 1947, Mr. Todia informed Mr. Chatterton that his clients would accept this offer of settlement. The regulations of the Department of Justice provided that only the Attorney General could accept a settlement on behalf of the United States. By memorandum dated November 17, 1947, the proposed settlement was submitted to the Attorney General and it was accepted by him on November 18, 1947.

21. The allocation of the amount to be awarded as just compensation for each of the four parcels from the total settlement of $65,000 was left to the former owners. These amounts were furnished to Mr. Chatterton by Mr. Todia as follows:

$11,000 for parcel 1, $30,000 for parcel 2, $20,000 for parcel 3 and $4,000 for parcel 4.

22. The terms of the settlement as to each parcel were embodied in an approved form of stipulation used by the United States in fee taking cases. The stipulation as to parcel 2 provided:

> COME NOW Ermino DeFranco, Antonio DeFranco and Mary Marino defendant(s) herein and hereby enter their appearances generally in this proceeding and hereby waive service of summons and any and all other process and notice in this proceeding and hereby waive all right to a hearing or trial on the issue of just compensation, and
>
> IT IS STIPULATED and agreed by and between the said parties hereto that the sum of THIRTY THOUSAND

dollars and No cents ($30,000.00), inclusive of interest, shall be in full satisfaction of and just compensation for the taking by the United States of America of (Parcel) No. 2 as described in the Petition in Condemnation, Declaration of Taking, and Decree on Declaration of Taking, together with and including all buildings and improvements thereon and all appurtenances thereunto belonging, and

IT IS FURTHER STIPULATED and agreed by and between the parties hereto that the sum of THIRTY THOUSAND dollars and No cents ($30,000.00), shall be subject to all liens, encumbrances and charges of whatsoever nature existing at the time of the taking of the said land and that any and all awards of just compensation ascertained and awarded in this proceeding and established by judgment herein to any and all parties now or subsequently named as defendants herein, shall be payable and deductible from the said sum, * * *

This stipulation was dated December 6, 1947, signed by A. F. O'Neil for the United States and by the former owners Ermino DeFranco, Antonio DeFranco and Mary Marino. It was filed in Civil Case No. 21234 on February 16, 1948.

Identical stipulations, except as to amounts, the names of the former owners and the parcel numbers, were executed and filed as to parcels 1, 3 and 4. There were two stipulations as to parcel 3. The first was signed by Florence F. Fertig and Julia C. DeFranco, and had their names in the first paragraph and the amount of $20,000 in the second and third paragraphs.

This stipulation was dated December 19, 1947, and filed in Civil Case No. 21234 on February 16, 1948. The second stipulation as to parcel 3 was signed by Florence F. Fertig, Administratrix of the Estates of Frank M. Fertig, deceased, and M. Freda Fertig, deceased, had her name

and the same designation in the first paragraph and the amount of $20,000 in the second and third paragraphs. This stipulation was signed January 17, 1948, and filed in Civil Case No. 21234 on February 16, 1948. The stipulation as to parcel 1 was dated December 30, 1947, and filed February 16, 1948. The stipulation as to parcel 4 was dated November 22, 1947, and filed December 1, 1947.

23. During the negotiations for settlement between Mr. Chatterton and Mr. Todia the fact that delinquent taxes were outstanding was discussed and Mr. Todia was informed that the taxes would have to be paid before he would get a check covering the settlement. The former owners of parcels 2 and 3 knew that delinquent taxes were outstanding when they signed the stipulations but they all testified that the amounts named were to be the net amount to them; otherwise they would never have agreed to these amounts which were less than outstanding tax liens against the property.

24. On February 16, 1948, a final judgment was entered in Civil Case No. 21234 as to parcel 2 as follows:

> This matter now coming on for hearing at this term of Court, and it appearing to the Court that the petitioner, the United States of America, has filed in this proceeding a Declaration of Taking (No. 1) covering lands in Cuyahoga County, Ohio, and deposited into the Registry of the Court the sum of $73,516.00 as estimated just compensation therefor, and that the title to said land was on the 23rd day of April, 1942, indefeasibly vested in the petitioner in fee simple absolute; that included in the land so taken is (Parcel) 2, described in the Petition in Condemnation, Declaration of Taking (No. 1) and Decree on Declaration of Taking (No. 1), for which estimated compensation in the sum of $21,450.00 was included in said deposit, as stated in the said Declaration of Taking (No. 1); and

That all persons owning or otherwise interested in said parcel of land have stipulated and agreed that the sum of $30,000.00, without interest, is the just compensation to be paid for the taking of said parcel of land;

—IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the sum of Thirty Thousand Dollars and No Cents ($30,000.00) is the full, adequate and just compensation for (Parcel) 2, included in the lands taken by Declaration of Taking and sought to be condemned in this proceeding; and that title to said (parcel) of land is vested in the United States of America and divested out of all other persons; and, the deposit in Court being $21,450.00:

IT IS FURTHER ORDERED that a deficiency judgment in the sum of 8,550 Dollars and 00 Cents ($8,550.00), be entered in favor of the defendants and against the petitioner, United States of America; and

That this proceeding be and the same is hereby retained for the further orders of this Court.

On the same day a final judgment was entered in Civil Case No. 21234 as to parcel 3 as follows:

This matter now coming on for hearing at this term of Court, and it appearing to the Court that the petitioner, the United States of America, has filed in this proceeding a Declaration of Taking (No. 1) covering lands in Cuyahoga County, Ohio, and deposited into the Registry of the Court the sum of $73,516.00 as estimated just compensation therefor, and that the title to said land was on the 23rd day of April, 1942, indefeasibly vested in the petitioner in fee simple absolute; that included in the land so taken is (Parcel) 3, described in the Petition in Condemnation, Declaration of Taking (No. 1) and Decree on Declaration of Taking (No. 1), for which estimated compensation in the sum of $13,450.00 was included in said deposit, as stated in the said Declaration of Taking (No. 1); and

That all persons owning or otherwise interested

in said parcel of land have stipulated and agreed that the sum of $20,000.00, without interest, is the just compensation to be paid for the taking of said parcel of land;

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the sum of Twenty Thousand Dollars and No cents ($20,000.00) is the full, adequate and just compensation for (Parcel) 3, included in the lands taken by Declaration of Taking and sought to be condemned in this proceeding; and that title to said (parcel) of land is vested in the United States of America and divested out of all other persons; and, the deposit in Court being $13,450.00:

IT IS FURTHER ORDERED that a deficiency judgment in the sum of 6,550 Dollars and 00 Cents ($6,550.00), be entered in favor of the defendants and against the petitioner, United States of America; and

That this proceeding be and the same is hereby retained for the further orders of this Court.

25. On April 8, 1948, an order for distribution was entered in Civil Case No. 21234 as to parcel 2 as follows:

This cause came on to be heard upon the application of the United States of America, petitioner herein, and it being shown to the Court that the right to the full fee simple title in and to Parcel 2 is now vested of record in the United States of America;

That by virtue of a stipulation and final judgment thereon, on file in this court, the agreed compensation for the taking of said Parcel 2 is the sum of $30,000.00 which has theretofore been deposited into the registry of this court;

That by virtue of a previous order of distribution the sum of $3,480.96 has been distributed from said funds, leaving on deposit the sum of $26,519.04 which should now be distributed to the persons entitled thereto.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Clerk of this Court be and he is hereby

authorized to issue a check in the sum of $26,519.04 to Ermino DeFranco, Antonio DeFranco and Mary Marino, c/o Attorneys Todia, Gordon and Sweeney, Terminal Tower Building, Cleveland, Ohio.

On the same day an order of distribution was entered in Civil Case No. 21234 as to parcel 3 as follows:

> This cause came on to be heard upon the application of the United States of America, petitioner herein, and it being shown to the Court that the right to the full fee simple title in and to Parcel 3 is now vested of record in the United States of America;
>
> That by virtue of a stipulation and final judgment thereon, on file in this court, the agreed compensation for the taking of said Parcel 3 is the sum of $20,000.00 which has heretofore been deposited into the Registry of this Court;
>
> That by virtue of a previous order of distribution the sum of $1,811.30 has been disbursed from said funds, leaving on deposit the sum of $18,188.70 which should now be distributed to the persons entitled thereto.
>
> THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Clerk of this Court be and he is hereby authorized to issue a check in the sum of $18,188.70 to Florence F. Fertig, individually and as Administratrix of the Estates of Frank M. Fertig, deceased and M. Freda Fertig, deceased and to Julia C. DeFranco, c/o Attorneys Todia, Sweeney and Gordon, Terminal Tower Building, Cleveland, Ohio.

Payments were made by the clerk of the court in accordance with these orders.

26. Mary Marino is deceased and Anthony O. DeFranco was appointed executor of her will on January 28, 1953, in Docket 486, Number 477749, Probate Court of Cuyahoga County.

CONCLUSION OF LAW.

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover, and the petition is therefore dismissed.

Supreme Court, U.S.
FILED
NOV 15 195
T. FLY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. 518.

FRANK M. BRENNAN,
As Treasurer of Cuyahoga County, Ohio,
Petitioner,

vs.

THE UNITED STATES,
Respondent and Third-Party Plaintiff,

vs.

FLORENCE F. FERTIG, JULIA C. DeFRANCO (a.k.a. MRS. ANTHONY DeFRANCO, JULIA FERTIG DeFRANCO), ERMINO DeFRANCO, ANTHONY O. DeFRANCO (a.k.a. ANTONIO DeFRANCO), Individually and as Executor of the Will of MARY MARINO, Deceased, ELMORE C. EGGERT and FREDERICK C. HAHN, Individually and as Guardian of HARTILL HAHN,
Third-Party Respondents.

REPLY BRIEF OF PETITIONER.

JOHN T. CORRIGAN,
Prosecuting Attorney of Cuyahoga County, Ohio,

SAUL S. DANACEAU,
Assistant Prosecuting Attorney,

FREDERICK W. FREY,
Assistant Prosecuting Attorney,

1560 East 21st St., Cleveland 14, Ohio,
Counsel for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. 518.

FRANK M. BRENNAN,
As Treasurer of Cuyahoga County, Ohio,
Petitioner,

vs.

THE UNITED STATES,
Respondent and Third-Party Plaintiff,

vs.

FLORENCE F. FERTIG, JULIA C. DeFRANCO (a.k.a. MRS. ANTHONY DeFRANCO, JULIA FERTIG DeFRANCO), ERMINO DeFRANCO, ANTHONY O. DeFRANCO (a.k.a. ANTONIO DeFRANCO), Individually and as Executor of the Will of MARY MARINO, Deceased, ELMORE C. EGGERT and FREDERICK C. HAHN, Individually and as Guardian of HARTILL HAHN,
Third-Party Respondents.

REPLY BRIEF OF PETITIONER.

I. JURISDICTION.

28 U. S. C. 2501, Supp. IV, provides:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

It is submitted that this language has the same meaning as that set forth in the petition for certiorari herein. The claim must be one of which the Court of Claims has jurisdiction. In this case that court had no jurisdiction

until the date of the federal mistake, April 8, 1948. Prior to that date no suit on this claim could have been brought in any court. The statute on this claim therefore started to run on April 8, 1948, because nowhere else could relief be obtained, and the case conforms to the jurisdictional requirements of the Court of Claims Act.

II. COMMENTS ON FACTS ALLEGED IN THE BRIEF OF THE UNITED STATES.

1. Petitioner believes it to be of considerable importance in this case to read the opinion of District Judge Jones in the eminent domain proceeding. This opinion and the facts found by it were ignored by the Court of Claims, erroneously, petitioner contends. The opinion of Judge Jones is attached to petitioner's reply (Rec. pp. 23 to 27) and is also plaintiff's exhibit No. 75. Judge Jones held that the case of *U. S. v. Dunnington*, cited in the brief of the United States, is not applicable to the facts, and why. More of this, under "Argument."

2. Reference, p. 3 of brief of the United States: The County Prosecutor's signing a stipulation to the effect that any taxes levied on the property taken, after the taking, would be null and void was no appearance in the case. It is the law anyway, and it had nothing to do with the merits of the proceeding, or even its incidents.

3. Reference, p. 3 of brief of the United States: The state-county officials were never notified of any of the settlement conferences between the United States Attorneys and the third-party respondents, nor of the money payments to them. The state-county authorities found this out only by pressing the federal attorneys for payment and were told that they would try to get the money to pay the county. That accounts for the time between April 8, 1948 and the filing of suit in the Court of Claims

in the spring of 1953. See petitioner's exhibits Nos. 1 to 68, showing that the county never stopped trying to get its money. See also the testimony of Smolka, Badzik and Frye as to their efforts to collect this money, transcript record of testimony, pp. 178, 179, 180, 187, 188, 239 to 245 incl.

4. Reference, pp. 3 and 4 of brief of the United States: The United States attorneys and the third party respondents all had actual knowledge of the nature, priority, and amounts of petitioner's tax claims. This knowledge was obtained by title examination reports, tax bills delivered to the federal attorneys, and the Ohio statutes charging any transferees of the land with knowledge of the tax liens and their priority. All this information was had by the United States long before the mistaken payment was made. See transcript of testimony, pp. 47, 48, 338, 340, 470, 471 bottom, 481, 482.

5. Reference, p. 4 of brief of the United States: Here the United States attorneys claim that Mr. O'Neil, the local federal attorney handling these cases, had no authority to agree to pay the state-county taxes without making state-county authorities parties to the proceeding. We have shown in our argument in our petition that it is lawful to pay tax lienors claims, on proof, without making them formal parties. In view of those authorities and of the testimony of Messrs. Smolka (transcript of testimony pp. 175, 176, 178, 179, 180, 188, 189) Badzik (transcript pp. 134, 136, 138, 143, 149, 150, 152) Frey (transcript pp. 238, 239, 240, 243, 245, 249, 258, 259) and Brennan (transcript pp. 44, 47, 48, 58, 61, 62, 68) the testimony of Mr. O'Neil, federal attorney, becomes very important, at p. 472, where he said, in speaking of Mr. Brennan, the County Treasurer:

> * * * I had paid him a couple of million dollars in taxes on other cases. I had had these cases for seven or eight years, and, as always, have never formally made the county treasurer or the county auditor a defendant. * * *

He goes on to say that he paid the taxes in all these cases to Mr. Brennan, where no county or state officer was made party to the proceeding. How, then, after having participated in such lawful practice for seven or eight years in many such cases, can the United States be heard to deny Mr. O'Neil's authority now? There is no denial of this practice and no evidence to the contrary. See other pertinent statements by Mr. O'Neil at transcript pp. 474, 481, 482, 489, 492, 493, 496. As to Mr. Chatterton, who negotiated the settlement with the third-party respondents, the transcript shows that he got specific authority from Washington to make the mistaken payments (transcript pp. 312 to 321, esp. at pp. 320 and 321). It is submitted that it is idle for the United States to deny the authority of its attorneys.

III. ARGUMENT.

1. The first point made by the United States is that its attorneys were not authorized to promise payment of petitioner's tax claims We submit that we have already disposed of that contention.

2. The Government's second point is that the obligation of the United States ends with the deposit of money in court and that the United States is not concerned with the distribution of those moneys. *U. S. v. Dunnington*, 146 U. S. 338, 352 is cited. That case and the cases following it hold, in substance, that the United States is not responsible for what courts do, or order done, with compensation money. Those cases have no application here because in this case the federal attorneys—not the judge—disposed of the money by signed agreements between counsel concerned. And in this case the federal attorneys perforce misrepresented the facts to the judge, by mistake, or he never would have signed the orders of distribution, for he is quite familiar with tax liens and their priority. Judge Jones so held in his opinion in the eminent domain proceeding. All these facts in evidence the trial examiner and the Court of Claims ignored. Petitioner claims that to be most prejudicial error.

3. The petitioner contends that whether or not the state-county authorities were parties to the eminent domain proceeding, the United States cannot, even by mistake, violate the provisions of the Fifth Amendment. If it could do so, who would be safe in dealing with the Government which we all trust completely?

4. The United States cannot, by the admitted mistake of its attorneys, compel a sovereign state or an individual to seek an uncertain relief from the people who were wrongfully paid all the compensation money in an

appropriation proceeding. This Court has repeatedly held that just compensation must be paid, barring some form of waiver, estoppel or abandonment of claim. No such thing as waiver, estoppel or abandonment, or failure to follow up the claims occurred here. The Government's obligation under the Constitution is to pay just compensation to those entitled to it, not to just anyone. See language of 40 U. S. C. sec. 258(a).

5. The Government is seeking to shift its liability here over to the third party respondents in a way it is believed the United States would not want and cannot afford to approve. Petitioner claims that his primary rights under these facts are against the United States; that he is not concerned with what happens between the United States and the third party respondents.

6.

> "A statute cannot be sustained as one of limitations where it requires a party, in full possession and enjoyment of property (or property rights) to bring an action within a given time or else forfeit it." 34 *Am. Jur.* p. 29 (words in parenthesis supplied).

IV. CONCLUSION.

For the reasons advanced in the petition and in this reply the petitioner submits that he is fairly entitled to a writ of certiorari.

Respectfully submitted,

JOHN T. CORRIGAN,

Prosecuting Attorney of Cuyahoga County,

FREDERICK W. FREY,

Assistant Prosecuting Attorney,

Attorneys for Petitioner.

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Supreme Court, U.S.
FILED
OCT 28 1957
JOHN T. FEY, Clerk

No. 515

In the Supreme Court of the United States

OCTOBER TERM, 1957

FRANK M. SHERRILL, as Trustee of CUTAHOLA
CORPORATION, Debtor,

Petitioner,

v.

THE UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 518

FRANK M. BRENNAN, AS TREASURER OF CUYAHOGA COUNTY, OHIO, PETITIONER

v.

THE UNITED STATES, FLORENCE F. FERTIG, JULIA C. DEFRANCO, ETC., ET. AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 17–25) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on July 12, 1957. The petition for a writ of certiorari was filed September 30, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTION PRESENTED

Whether the Court of Claims correctly dismissed as untimely a suit filed in 1953 to recover for an

alleged taking of lands on which petitioner had held tax liens when, to the knowledge of the State and local taxing officials, proceedings to condemn such lands were instituted in 1942, physical possession was taken at that time, title was likewise then acquired and a housing project was constructed thereon.

STATUTE INVOLVED

28 U. S. C. 2501, Supp. IV, provides:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

STATEMENT

The facts, as found by the Court of Claims, may be briefly summarized as follows:

In April 1942 the United States filed proceedings to condemn fee simple title, free and clear of all liens, to thirteen parcels of land in Cuyahoga County, Ohio. A declaration of taking was filed the same day and estimated compensation was deposited in court (Fdg. 1, Pet. App. 25–26). A housing project known as Lake Shore Village was constructed on the land, being completed in 1943 and 1944 (Fdg. 19, Pet. App. 36). There were liens upon the lands at the date of taking for taxes and special assessments for many years earlier.

Neither the State, the County or any official of either was named as a party or formally appeared in the proceeding. The county officials had knowledge of the suit. The Prosecuting Attorney who was respon-

sible for representing the County in federal condemnation actions signed and approved of an order of the federal condemnation court declaring all taxes levied after 1942 to be null and void (Fdg. 10, Pet. App. 31–32). The local officials were fully informed of the progress of the proceedings and, under court orders, the amounts due on all of the parcels except parcels 2, 3 and 5 were paid (Fdg. 6, Pet. App. 28–29). Here concerned are the taxes which were liens on parcels 2 and 3, the taxes as to parcel 5 having been collected after the suit was filed (Fdg. 16, Pet. App. 35–36).[1]

The amount of just compensation was agreed upon with the former owners of parcels 2 and 3 in stipulations which provided that the agreed amount should be subject to "all liens, encumbrances and charges of whatsoever nature" existing at the date of taking and that all awards of just compensation to all parties "now or subsequently named as defendants herein" should be payable from the agreed amount (Fdg. 22, Pet. App. 37–39). This same form was used to express settlements made as to other parcels (Fdg. 22, Pet. App. 38). The funds deposited by the United States were, however, distributed by the Court to the former owners of parcels 2 and 3 without deduction of taxes owing (Fdgs. 24–25, Pet. App. 39–42). The Chief Deputy County Treasurer knew of this payment within a month of the final orders of distribution filed April 8, 1948, and he informed the Assistant Prosecuting Attorney (Fdgs. 10, 15, Pet. App. 31, 35).

[1] Partial payment was made under orders of distribution as to parcels 2 and 3 (Fdg. 6, Pet. App. 28–29).

The present action was filed on April 13, 1953, no County official having ever made demand upon the former owners of parcels 2 and 3 or having even attempted to ascertain whether demand could result in payment to the County (Fdg. 16, Pet. App. 35–36). Such payment was made as to parcel 5 when the United States Attorney made written demand after the suit was filed. (Fdg. 16, Pet. App. 36). Also, the United States moved in the condemnation proceeding asking that the County be formally joined therein as a party and that the former owners be required to redeposit the amounts of the taxes due. The County officials opposed that motion which was denied. The United States caused the joinder of the former owners as third-party defendants to the present proceeding.

Petitioner had argued that it was relying on promises made by the federal attorney handling the case. Consequently, in addition to the facts just outlined, the Court of Claims found (Fdg. 18, Pet. App. 36):

> It is not established that Mr. O'Neil had authority by virtue of his office or was otherwise authorized to make any commitment to, or enter into any arrangement with, any county official binding the United States with respect to payment of taxes to the county. The contemporary documentary evidence does not show that Mr. O'Neil made any commitment to, or entered into any arrangement with, any county official with respect to payment of delinquent taxes.

The Court of Claims held that this suit was barred by the six year limitation upon suits against the United States, also stating that the County's remedy was in the condemnation proceeding, of which it had actual knowledge (Pet. App. 17–19). Chief Judge Jones filed a dissenting opinion in which Judge Littleton joined.

ARGUMENT

Petitioner's entire argument is founded upon two interrelated assertions which reflect an erroneous view of both the facts of this case and the law which is applicable to those facts. First, the court has found, contrary to petitioner's assertions, that the government attorney was not authorized to and did not promise the taxing authorities that the United States would assume responsibility for correct distribution of the tax share of the deposits. Second, the federal law has long been settled that the obligation of the United States is discharged when it pays compensation representing the value of the property into court, and the United States is not concerned with distribution of those funds, is not responsible for errors the court may make in such distribution and is not even entitled to receive notice of orders of distribution. *United States* v. *Dunnington*, 146 U. S. 338, 352.[2] The United States acquires a title free

[2] See also *United States* v. *Adamant Co.*, 197 F. 2d 1 (C. A. 9); *Phillips* v. *United States*, 151 F. 2d 645 (C. A. 7); *United States* v. *Certain Lands in Borough of Brooklyn*, 129 F. 2d 577 (C. A. 2); *City of St. Paul* v. *Certain Lands in City of St. Paul, Minn.*, 48 F. 2d 805 (C. A. 8); *John Hancock Mut. Life Ins. Co.* v. *Casey*, 147 F. 2d 762 (C. A. 1).

of encumbrances which are transferred to the funds which take the place of the property. *Duckett* v. *United States*, 266 U. S. 149, 151. The courts have very frequently been called upon to apply these principles with relation to claims of taxing authorities, *e. g.*, *United States* v. *150.29 Acres of Land*, 135 F. 2d 878 (C. A. 7); *Washington Water Power Co.* v. *United States*, 135 F. 2d 541 (C. A. 9), certiorari denied, 320 U. S. 747; *Cobo* v. *United States*, 94 F. 2d 351 (C. A. 6); *People of Puerto Rico* v. *United States*, 134 F. 2d 267 (C. A. 1), certiorari denied, 320 U. S. 753. Thus, petitioner is wrong when he asserts (Pet. p. 12) that the United States would be compelled to pay State and County taxes even if the appropriate officials had been formally named as parties. In either case, the obligation of the United States is merely to pay the fund into court.

What petitioner constantly refers to as "the federal mistake"—meaning the distribution of the funds—was not the act of the United States but of the court.[3] And the distribution of the funds by the court could not constitute a taking by the United States. That taking had occurred many years earlier when the United States filed the proceedings, took physical possession, took title under the Declaration of Taking Act and constructed the project. If we assume,

---

[3] This Court has said, in *United States* v. *Dunnington*, 146 U. S. 338, 351–352: "The courts of the United States are in no sense agencies of the Federal government, nor is the latter liable for their errors or mistakes; they are independent tribunals, created and supported, it is true, by the United States; but the government stands before them in no other position than that of an ordinary litigant."

arguendo, that petitioner was not bound by the condemnation proceedings, then the case presented would be as if the United States had seized possession without instituting proceedings. There would then have been a taking at the time of seizure. On that assumption, the six year time limit for recovery for the taking had long since expired, as the Court of Claims held.

We think it is also clear that the local authorities were, in fact, parties to the condemnation proceedings. They had actual knowledge of them and engaged in extensive correspondence concerning them. More important, the Prosecuting Attorney approved what was, in effect, a consent order containing an injunction against collecting taxes after 1942 on these lands. And the taxing authorities received, pursuant to orders of distribution, some of the taxes due on these parcels as well as all taxes due on other parcels. Petitioner has thus received benefits as if formal joinder as a party had been accomplished. A remedy was readily available for collection of the taxes in the condemnation proceedings.[4] Thus the facts of this case are certainly a far cry from the "citation by rumor or by the uncertain word of village gossip" referred to in the dissenting opinion (Pet. App. 20).

In essence petitioner seeks to transfer to the United States his duty of seeing that the taxes are collected. No statute, contract or rule of law authorizes imposi-

[4] No reason appears why, even after the mistaken distribution, the matter could not have been corrected by the court if called to its attention with reasonable promptness. Cf. Rule 60 (b), F. R. Civ. P.

tion of such a function upon federal attorneys conducting condemnation proceedings.

CONCLUSION

There is no conflict of decision nor issue warranting review by the Court. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
PERRY W. MORTON,
Assistant Attorney General.
ROGER P. MARQUIS,
Attorney.

OCTOBER 1957.

U. S. GOVERNMENT PRINTING OFFICE: 1957